IN THE

Supreme Court of the United States

———— Term, 1969

No. ————

UNITED STATES OF AMERICA,

Appellee

v.

LEMUEL THOMAS SMITH

Appellant

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Appellant, Lemuel Thomas Smith, defendant in this case, respectfully petitions this Court for a Writ of Certiorari, and in accordance with Rule 23 of the Rules of the Supreme Court of the United States, shows to the Court that:

(a) Decision was rendered by the United States Court of appeals for the Fourth Circuit on March 4, 1969 which opinion has not been published as of this date in any official or unofficial reports. In accordance with Subparagraph (i) of Rule 23, a copy of said opinion is appended to this Petition. There was no written opinion rendered in the United States District Court for the Western District of North

Carolina from which Court this Appellant appealed to the United States Court of Appeals for the Fourth Circuit.

(b) The jurisdiction of this Court is invoked on the basis as follows:

(i) Date of entry of the Judgment sought to be reviewed by this Court is March 4, 1969, which Judgment was entered on that date; and

(ii) There was no order respecting a rehearing; and

(iii) The jurisdiction for this Writ is based upon Rule 22 (2) of the Rules of this Court which is authority for this Court to review by Writ of Certiorari the Judgment of a Court of Appeals in a criminal case. The criminal statute involved in the proceedings is Title 18 U.S.C. § 659.

(c) The question or issue presented for review is whether the United States Court of Appeals for the Fourth Circuit committed error in affirming the trial court's overruling the motion of the Appellant-Defendant for acquittal at the conclusion of the Government's evidence. The Appellant-Defendant contends error of the said Court of Appeals in affirming the denial of the Appellant-Defendant's motion for judgment of acquittal at the conclusion of the Government's case in that there was insufficient evidence to submit the case to the jury on Count III of the Bill of Indictment, the only Count upon which the Appellant-Defendant was found guilty.

(d) The statute of the United States Code which this case involves is 18 U.S.C. § 659, the material part of which statute, 18 U.S.C. § 659, involved in this case is as follows:

"Whoever . . . has in his possession any such goods or chattels, knowing the same to have been embezzled

or stolen . . . [shall be punished according to the statute]."

The verbatim copy of said statute is as follows:

"§659. Interstate or foreign baggage, express or freight; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce

or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money; freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25,

1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 13, 63 Stat. 91."

(e) Southern Fibers, Incorporated, is located at 1609 North Brevard Street in Charlotte, North Carolina. The premises run about a block and a half or two blocks north and south on Brevard Street and about three-quarters of a block deep between the Southern and Norfolk and Southern tracks. On the premises are located six warehouses designated A through J. The premises are partly fenced. Between Warehouses D and E, there is a metal building or shed. The nature of the business of Southern Fibers, Incorporated is cotton waste.

The defendant Smith was assumed to be the general manager of Southern Fibers or owner. He was the owner of T. S. Enterprises. He works almost every day and most of the time arrives in the afternoon. He has no set time to get there. On October 15, 1967 between 12 o'clock noon and 1:00 p.m., an Old Dominion Freight Lines' tractor-trailer unit was found missing from its freight depot in Charlotte. Later on that day it was found empty at Tom's Truck Stop in Charlotte, which is approximately two and one-half miles from the freight yard. The goods which were shipped on the trailer consisted of some 31 different interstate shipments of goods such as sport shirts, carpeting, trousers, blankets, etc.

The total dollar value of the goods was $23,974.44.

On November 2, 1967, the F.B.I. searched the Southern Fibers, Incorporated premises on the strength of a search warrant. The merchandise was found on the premises in Buildings C, D and the shed. Nothing was found in any other building or warehouse, except one label which came from a trailer located in the yard.

On October 15, 1967, two telephone calls were made from Southern Fibers, Incorporated in Charlotte to a number in Rock Hill, South Carolina listed to a Tom Smith.

There was no evidence that the defendant Smith was in, near or around Warehouses C or D or the shed or the trailer at any time; nor was there any evidence that he was even on the premises on October 14, October 15 or November 2, 1967; nor, as a matter of fact, was there any direct evidence of his ever being on the premises during the intervening period of time except such periods of time he would be there in his usual routine. To the contrary, on one of the revelant days, on November 2, 1967, the day of the search, he was in Winston-Salem.

There was no evidence that there was ever any activity in or around either of the two warehouses or the shed at any time. The evidence was all to the contrary.

It was never established who had keys to the warehouses or the shed. The Government proved by its case that no one had a key to any of the involved buildings. There was no evidence of when or how the merchandise was placed on the Southern Fibers' premises. It could have been October 14, 1967 or it could have been November 1, 1967, under the Government's evidence, or it could have been any day in between. There was no evidence that the defendant Smith ever even saw the merchandise, albeit possessed any of it, or even knew the slightest thing about the occurrence. On the contrary, the only competent remarks attributable to the defendant Smith in the whole trial exculpate him from any such knowledge when on November 2, 1967, he was called at Winston-Salem from Charlotte by Miss Smith and informed of the F.B.I. search, and on page 11 of the Joint Appendix, you will find the following colloquy:

"Q. And shortly after they came, did you call Mr. Smith?

A. I did.

Q. What did you tell him?

A. I told him the F.B.I. was out there and asked me to let them go over the property, was it all right. He said, 'Sure, it's perfectly all right.' "

And once again after the search on November 2, 1967, wherein the employee Ned Higgins said on page 208 of the transcript (App. 18-19):

"Q. Did you have any discussion with Mr. Smith or Mr. Curtis after the F.B.I. agents were out there?

A. Yes, I did say to him, I said, 'I don't like to have keys and things, things that's shipping and I don't know anything about it.' Mr. Smith told me, he said, 'Well, you need not worry.' He said, 'I don't have no stolen goods down there.'

MR. KNOX: Your Honor, I don't get it.

THE COURT: What did you say Mr. Smith said?

THE WITNESS: He said I didn't have nothing to worry about. He said he didn't have no stolen goods around there."

There was no evidence that the defendant Smith ever intended to, or in fact did exercise any authority or dominion or control over any of the property in question.

(f) That portion of Rule 23, Subparagraph (f) is inapplicable.

(g) This is a case involving a judgment of the Federal Court. The case involves an alleged violation by the Ap-

pellant-Defendant of the knowing possession of portion of Title 18 U.S.C. § 659, which statute is the basis for Federal jurisdiction of the Court in the first instance.

(h) The Appellant-Defendant suggests that this Writ should be allowed in that the United States Court of Appeals for the Fourth Circuit rendered its decision in conflict with the decision, and cases following the decision, of of the Third Circuit in *U.S.* v. *Russo*, 123 F 2d 240, which latter case established the principle in cases similar to this case that when possession of the stolen property is that of constructive possession only, then and in that event, possession of such property recently after the theft of said property *alone* does not justify the inference that the possessor *knew* that the property was stolen property. In such cases, the Ninth Circuit, in *U.S.* v. *Torres*, 270 F 2d 252, at 259, establishes the principle, consistent with the *Russo* principle, that in all of such cases some affirmative action on the part of the defendant has to be established in order to show "guilty knowledge" and that constructive possession alone is insufficient to show that said indispensable element of this crime.

The Fourth Circuit in this case conceded that the defendant's possession was based not only upon circumstantial evidence, but also that such possession *was inferred* by reason of his ownership and control of the premises. There was no "affirmative action" on the part of the defendant to indicate "guilty knowledge" and the Fourth Circuit refused to apply the principle in the *Russo* case as enlarged upon by the Ninth Circuit in the *Torres* case.

It is upon this conflict between the Circuits that the Appellant-Defendant suggests that this Court should grant this Writ. The Appellant-Defendant has not found any decision of this Court which involves this conflict.

(i) See Subparagraph (a) hereof. Appended to this Petition is a copy of the opinion of the United States Court of Appeals for the Fourth Circuit which decision is sought to be reviewed by this Court.

(j) See Subparagraph (a) and (i) hereof.

Respectfully submitted,

LEMUEL THOMAS SMITH,
Appellant-Defendant

By: /s/ J. J. WADE, JR.
J. J. Wade, Jr., *Attorney*

Of Counsel:

WARDLOW, KNOX, CAUDLE & WADE
1416 Johnston Building
Charlotte, North Carolina 28202

Dated: April 14, 1969

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,485.

United States of America,

Appellee,

versus

Lemuel Thomas Smith,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Wilson Warlick, Chief District Judge.

(Argued February 3, 1969. Decided March 4, 1969).

Before BOREMAN, BRYAN and WINTER, Circuit Judges.

J. J. Wade, Jr., (Charles E. Knox, and Wardlow, Knox, Caudle & Wade on brief) for Appellant, and Joseph R. Cruciani, Assistant United States Attorney, (William Medford, United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

Appellant, Lemuel Thomas Smith, was convicted by a jury of violating Title 18 U.S.C. § 659 by having in his possession chattels of a value in excess of One Hundred Dollars, knowing that said chattels had been stolen from

a shipment moving in interstate commerce. At the close of the Government's evidence defendant and two others who were named in the indictment moved for judgment of acquittal on the ground that the evidence was insufficient to go to the jury. The court denied the motion as to the defendant but granted the motion as to the others. The defendant did not testify and no evidence was offered on his behalf. The case was submitted to the jury which returned a verdict of guilty. The sole error asserted on appeal is the denial of defendant's motion for judgment of acquittal.

The Government's evidence disclosed that merchandise stolen in Charlotte, North Carolina, from an interstate shipment while in transit by trailer-truck was found and seized during a search conducted on November 2, 1967, by federal agents pursuant to a valid search warrant in certain warehouses controlled and managed by the defendant and owned by his corporation, Southern Fibers, Inc., in Charlotte, North Carolina.[1] Southern Fibers was ostensibly in the "cotton waste" business.

The seized merchandise consisted of 242 pairs of corduroy trousers, with no identifying labels, 47 pairs of overalls with no labels but with size notations written inside the right-hand pockets, 138 rolls of plastic webbing, furniture, cartons of drapes, cartons of men's shirts, a Ford engine and a cardboard box containing shipping labels removed from the shipments of the stolen merchandise. On a trailer owned by defendant's company, Southern Fibers, and parked in front of the company warehouses the agents found one shipping label from the shipment

[1]The trailer-truck containing the interstate shipments was stolen on or about October 15, 1967, and was found a short time thereafter abandoned at a service station or truck stop which serviced Southern Fibers' vehicles. The contents of the trailer had been removed.

of the stolen merchandise. It is not disputed that a trailer load of merchandise that was moving in interstate commerce was stolen, and that a large part of this merchandise with labels removed was later found on the premises of Southern Fibers. Other evidence indicated that attempts had been made to render the merchandise unidentifiable. Southern Fibers owned a row of six connected warehouses and the stolen property was found in the two warehouses identified as C and D and a metal shed adjoining warehouse D.

At the time of the search and seizure the defendant was not present but his female secretary telephoned him immediately and reported that the FBI agents were conducting a search of the premises. The defendant indicated to her no objection to the search. She later turned over to the defendant a list of the seized merchandise.

The female bookkeeper testified that Smith owned Southern Fibers and that she took her orders from him; that he was there almost every day; that he owned and operated another business under the name of "T. S. Enterprises" but she kept no books for this business and knew little about it. She stated that she knew of no buildings on the premises owned or used by T. S. Enterprises. The secretary testified that she had worked at Southern Fibers from its very beginning and that the defendant was the general manager of the warehouses; *that she had been instructed by defendant never to let anyone past the warehouse doors.*

Witness Tribble, the comptroller and warehouseman, who regularly received and shipped merchandise, testified that he worked for Southern Fibers but had nothing to do with warehouses C and D; that he never saw and did not know what went on in those buildings; that he never went

into them; that he had no keys to C and D and did not know who had the keys. He was present during the search and opened some of the warehouses but had no keys to C or D or the shed where the Ford motor was found. He disclaimed knowledge of the business of T. S. Enterprises.

Witness Higgins, the maintenance superintendent of Southern Fibers, testified that he had worked for the defendant for the last four or five years; that he usually had keys for all buildings on the premises but did not have keys for C and D on the day of the search; that on that day "they probably could have gotten lost or something. I don't know." When the federal agents told him that they could break the doors open if he did not furnish the keys he told them to go ahead and break them open, stating, "I ain't got nothing in there."

The evidence revealed that on Sunday, the day following the theft of the trailer which contained the stolen merchandise discovered in C and D, two telephone calls were made from one of Southern Fibers' telephones, an unlisted number, to a telephone number in Rock Hill, South Carolina, listed in the name of "Tom Smith." One call was made at 4:18 P.M. and one at 4:55 P.M.

In *United States v. Casalinuovo*, 350 F. 2d 207, 209 (2 Cir. 1965), the court stated:

> "The crime in question is 'possession' of goods known to have been stolen from interstate commerce, and it cannot be assumed that Congress was intending to impose criminal liability only upon those persons caught red-handed holding goods they have seen stolen from an interstate truck or train. Accordingly, the courts have held the statute to reach 'constructive' possession as well as actual possession, i.e., such a nexus or relationship between the defendant and the goods that it is reason-

able to treat the extent of the defendant's dominion and control as if it were actual possession. Cf. Holmes, The Common Law, 216 (1881). * * *."

The stolen merchandise was found in locked warehouses C and D located between the offices and the other warehouses. Defendant was actually on the premises almost every day. He was the one who issued orders and instructions to all employees. He had given instructions to his secretary never to let anyone past the warehouse doors. Warehouseman Tribble did not carry keys to buildings C and D and he did not know what business was carried on there. Higgins usually had keys for all the warehouses but did not have keys for C and D on the day of the search. Defendant was the owner and general manager of the premises where the stolen merchandise was found; he was the one for whom everybody worked; he was the one to whom reports were made and one who was present almost daily.

Proof of defendant's possession of the stolen merchandise is based upon circumstantial evidence but it seems that better evidence of his possession could be provided only by direct and positive testimony that he was actually observed in the act of unloading the merchandise from a truck and carrying it into the warehouses. If the trial court concluded that defendant's "possession" could be *inferred* from his ownership and control of the premises and the other facts and circumstances disclosed by the evidence, the inference is neither illogical nor impermissible.

In *Rugendorf v. United States,* 376 U.S. 528 (1964), the defendant was convicted of knowingly concealing stolen fur garments in violation of 18 U.S.C. § 2315. The stolen furs were found in the closet in a game-room in the basement of defendant's home during a search pursuant

to a valid search warrant. The defendant and his wife were away on two weeks' vacation at the time of the search. Four persons had keys to the house, including defendant's brother who was known to be a receiver of stolen property. The furs were hanging in the closet along with a fur piece owned by defendant's wife. Holding the evidence sufficient to sustain the conviction the court observed:

> "As early as 1896 this Court dealt with such situations. In *Wilson v. United States*, 162 U.S. 613, Chief Justice Fuller held for a unanimous Court that '[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight *unless explained by the circumstances or accounted for in some way consistent with innocence.*'" (Last emphasis supplied.) (376 U.S. 536, 537)

In the instant case there were circumstances from which knowledge that the property found in the search was stolen could be logically inferred. These warehouses were a one-owner operation with the owner, the defendant, being present almost every day. He would naturally be aware of the activities on the premises and particularly aware of unusual illegal activities in two of the six warehouses. The arrival and storage of a trailer load of valuable merchandise not connected with the legitimate business activities of such a small establishment would hardly go unnoticed. Employees produced keys for all warehouses except C and D where the stolen merchandise was found. Tribble and Higgins, who by their positions of employment would be expected to know what was in all six warehouses, denied knowing or having anything to do

with what was stored in warehouses C and D. Higgins usually had keys for all warehouses but could not satisfactorily explain why he did not have them on the day of the search. Obviously attempts had been made to obliterate identification of the merchandise. Labels had been removed from cartons and from the merchandise itself. One box of labels was found in warehouse D. One label was found on the only trailer owned by Southern Fibers. Sizes were written on the inside pockets of some of the stolen overalls. Employees of defendant at Southern Fibers uniformly denied working in or seeing anyone working in warehouses C and D. Some considerable activity and time must have been expended in efforts to render difficult the identification of the merchandise.

In *Dirring v. United States,* 328 F. 2d 512, 515 (1 Cir. 1964), it was held:

> "* * *. The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt."

In *United States v. Valenti,* 134 F. 2d 362, 364 (2 Cir. 1943), *cert. denied,* 319 U.S. 761, the following appears:

> "* * *. It is the court's function to decide whether the evidence is competent to justify certain inferences; it is not the court's function to decide which of various inferences should be drawn. Nor is the jury to be limited to drawing only the inference most favorable to the accused. * * *."

The rule in this circuit was enunciated by Judge Soper in *Bell v. United States,* 185 F. 2d 302, 310 (4 Cir. 1950):

> "* * *. When a motion for a directed verdict of acquittal is made in a criminal case, the sole duty of the trial judge is to determine whether there is substantial evidence which, taken in the light most favorable to the United States, tends to show that the defendant is guilty beyond a reasonable doubt. The possibility that a jury may have a reasonable doubt upon the evidence as to the guilt of the defendant is not the criterion which determines the action of the trial judge. The decision on that question is for the jury to make and the rule is the same whether the evidence is direct or circumstantial. * * *."

We find no error in the denial of the defendant's motion for judgment of acquittal and the submission of the case to the jury.

Affirmed

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1262

LEMUEL THOMAS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Western District of North Carolina of having in his possession chattels stolen from an interstate shipment in violation of 18 U.S.C. 659. The sole issue raised in the petition for a writ of certiorari is the sufficiency of the evidence to support the conviction, an issue fully discussed in the opinion below.

For the reasons set forth in that opinion, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1969.

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